No. ~~619~~

Supreme Court of the United States

October Term, 1962

THE WHITE MOTOR COMPANY, *Appellant*,

v.

UNITED STATES, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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MISCELLANEOUS:

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ARGUMENT

The Government, with complete disregard for generations of legal and business history, invites this Court to affirm summarily a decision of a single District Judge that was itself rendered without a trial of the facts upon a motion for summary judgment. This Court is thus asked to abolish, in such manner, a business practice of long and respectable standing and of particular importance to relatively small firms, such as appellant, in their competition with larger units.

The Motion to Affirm represents that the legal questions involved in this case are so clear that only citation of prior decisions by this Court and others is required to dispose of them. The questions that the Government treats so cavalierly have seemed far more substantial to responsible legal scholars. Of all the recent writings on this subject by distinguished commentators, not one has been found that shares the Government's doctrinaire certainty. See, *e.g.*, Note, *Restricted Channels of Distribution Under the*

Sherman Act, 75 Harv. L. Rev. 795 (1962) (see especially the analysis of the District Court's opinion in this very case, *id.* at 797-801); Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 Cornell L.Q. 254 (1960); Hale & Hale, *Market Power* § 2.13 (1958); Handler, *Annual Antitrust Review*, 11 Record B.A. City of N.Y. 367, 377-81 (1956); *Report of the Attorney General's Committee to Study the Antitrust Laws* 27-29 (1955); Rifkind, *Divisions of Territory Under the Antitrust Laws*, in CCH, *Antitrust Law Symposium—1953*, at 173 (1954).

Moreover, as will be demonstrated, the authorities relied upon by the Government bear, at most, tangentially on the legality of agreements of the kind here involved. The pertinent case law, far from supporting the novel notion that such agreements are illegal *per se*, in fact upholds them as classic reasonable restraints of trade ancillary to a valid business purpose.

I. Additional Statement of Facts

Preliminarily, it should be noted that there is no issue before this Court concerning price-fixing.[1] That issue received wholly separate treatment in the District Court's opinion (194 F. Supp. at 571-7) and final judgment (¶ IV (B)), and no appeal was taken from the judgment with respect to it, apart from questions as to the scope of relief. So far as the issues framed herein are concerned, each of the challenged provisions of appellant's dealer and distributor contracts is either illegal standing alone, or not at all. The fact that such contracts contained resale-price-

[1] Indeed, there has never been any retail price-fixing of trucks. The only retail price-fixing at issue in the Court below concerned sales of *parts* to limited classes of customers. See United States v. White Motor Co., 194 F. Supp. 562, 569-70 (N.D. Ohio 1961). Accordingly, since price-fixing was never coextensive with appellant's distribution system, it could not be argued (and the Government has not argued) that appellant's territorial and customer restraints are illegal *per se* because in aid of such a system.

maintenance provisions of limited scope at some time in the past is irrelevant.

Solely at issue are two types of separate provisions of appellant's contracts with its distributors and certain of its dealers. First, each distributor and dealer agrees with appellant not to sell trucks to customers who do not have places of business within a certain territory. Second, each distributor and dealer agrees not to sell trucks to certain classes of customers without appellant's consent. Each of these provisions, independently of the other, was held unlawful *per se* by the Court below (194 F. Supp. at 577-85), and is covered by a separate adjudication of illegality in the final judgment (¶ IV (A)).

II. The Sweeping Effect of the Decision Below

The decision of the District Court is written in terms that could hardly be more inclusive. It invalidates at one stroke all territorial and customer limitations in all industries. Furthermore, it does so without regard to any considerations of reasonableness or business necessity. It drastically expands the limited classes of restraints on trade hitherto condemned as *per se* illegal. The decision is really more like a statute than anything else. It is not only these particular contracts that are struck down. It is not only the White Motor Company whose distribution system is destroyed. Henceforth, *no one* may employ the exclusive territorial distributorship device.[7] It is self-evident that such a decision, if it is to be made at all, should be made by this Court, and only after that full considera-

[7]Furthermore, the decree places restraints on White itself that are unnecessary to the eradication of the illegality found by the District Court (assuming for the moment that the finding was correct). White is forever enjoined from using territorial and customer limitations in its foreign operations, and also is forbidden ever to avail itself of the Miller-Tydings Act. In these respects, as in others (J.S. p. 19), the decree exceeds the bounds of proper equitable relief. See United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 729 (1944).

tion and mature deliberation possible after full briefing and argument.

III. Prior Cases Do Not Require or Support Summary Affirmance

A. The *Bausch & Lomb* Case

The principal reliance of the Motion to Affirm is on *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). This case, it is said, makes any analysis unnecessary. The Court is told that the case holds territorial and customer restrictions illegal *per se*, and that is the end of the matter. But the truth is that no amount of ingenuity or selective quotation can turn *Bausch & Lomb* into anything more than a price-fixing case, as a perusal of the record and briefs therein, on file in this Court, will quickly show. (Nos. 62 and 64, October Term, 1943). There is not a word in the opinions, nor in the contracts that were attacked (see Transcript of Record, p. 699), about territorial limitations. The complaint alleged price-fixing and customer restrictions ancillary thereto. Paragraph 22 (Record, p. 9) states the gravamen of the complaint, as follows:

> ". . . the defendants have refused to license retailers to sell Soft-Lite lenses whom said defendants considered to be price cutters or engaged in business practices of a nature disapproved by the defendants."[3]

Judge Rifkind's Findings of Fact in the District Court echo this same theme. Finding 17 (Record, p. 55), the key finding, reads as follows:

> "17. By the establishment, operation, and enforcement of its licensing system, Soft-Lite, since that time, has exercised control over the prices to be charged by optical wholesalers and retailers for Soft-Lite lenses."

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[3] The latter reference is to dealers who insisted on handling lenses manufactured by Soft-Lite's competitors.

The District Court's opinion emphasized that the entire distribution system at issue had as its central purpose the maintenance of high retail prices. The Court said, for example:

> "Obviously, trade is restrained by the distribution system of Soft-Lite. Nor need we be concerned to inquire whether the restraint is unreasonable. . . . since price fixing is illegal per se." *United States v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 395 (S.D.N.Y. 1942).

The parties' briefs in this Court, moreover, treated the case as involving price fixing aided by a restrictive distribution system. See, *e.g.*, Statement as to Jurisdiction for United States, p. 9; Brief of United States, p. 28. And this Court's opinion, in summarizing the holding of the case, said:

> ". . . a distribution system exists . . . which is illegal because of unallowable price fixing contracts. . . ." 321 U.S. at 724.

Even that portion of the opinion on which the Government most strongly relies refers not to territorial restraints, but to customer restrictions either in aid of price-fixing, or as part of a group boycott, as is clear from the Court's allusions to the Miller-Tydings Act, and to *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941). See 321 U.S. at 721, quoted on p. 6 of the Motion to Affirm. It is clear that *Bausch & Lomb* was presented to and decided by this Court as a case of price-fixing aided by a restrictive distribution system. Moreover, by no stretch of the imagination does the case have anything to do with territorial restraints.[4]

[4]In fact, the District Court actually sustained an exclusive distributorship contract. The Supreme Court affirmed the judgment as to this point by an equally divided vote.

What is thus clear from the records, briefs and opinions in *Bausch & Lomb* itself becomes doubly clear upon examination of the interpretations of that case made since the decision was handed down. So far as diligent research discloses, no court has yet construed the case as holding either territorial or customer restrictions, standing alone, illegal *per se*—except, of course, for the Court below in this case. In 1945, Mr. Justice Douglas, concurring in *Associated Press v. United States*, 326 U.S. 1, 23 (1945), gave what is surely the true exposition of *Bausch & Lomb*:

> "Every exclusive arrangement in the business or commercial field may produce a restraint of trade. . . . But *Standard Oil Co. v. United States*, 221 U.S. 1, construed the Sherman Act to include not every restraint but only those which were unreasonable. . . .
>
> "But . . . an exclusive arrangement, though innocent standing alone, might be part of a scheme which would violate the Sherman Act in one of two respects.
>
> "(1) It might be a part of the machinery utilized to effect a restraint of trade in violation of § 1 of the Act. Cf. *United States v. Bausch & Lomb Co.*, 321 U.S. 707."

After he left the bench, Judge Rifkind, who had decided *Bausch & Lomb* in the District Court, wrote an article on the subject of territorial restraints without even citing the case on the point at issue here. Rifkind, *op. cit. supra* p. 2. Counsel for the United States in this case, writing five years after *Bausch & Lomb*, stated that the question of territorial restraints was not foreclosed by any decided cases. Loevinger, *The Law of Free Enterprise* 114-15 (1949). It cannot be that he did not know of *Bausch & Lomb*. Rather, it is obvious that he (correctly) did not consider it dispos-

itive. And finally, even the District Court below did not cite *Bausch & Lomb* in invalidating territorial restraints. To insist, in disregard of these authorities, that the case is controlling here is merely to demonstrate the weakness of the Government's position.

If *Bausch & Lomb* "plainly governs the present case," if "the issues have all been resolved" by that decision (as the Government asserts, Motion to Affirm, pp. 6, 5), it is difficult to understand why the Government avoided tendering the identical issues to Judge Forman in *United States v. Volkswagen of America, Inc.*, 182 F. Supp. 405, 409, 411-12 (D.N.J. 1960), where it argued that it was not necessary for him to pass upon the validity of the alleged territorial restrictions because they were part and parcel of a vertical price fixing conspiracy.

B. The Ancient Doctrine of Restraints on Alienation

The Government next summons to its aid no less an authority than Sir Edward Coke. Section 360 of his *Commentary upon Littleton*, as cited by this Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404-05 (1911), is said to declare that limitations upon the territory of resale, or the persons to whom resale may be made, are restraints upon alienation which common law [illegible]. But, of course, the cited section of Coke refers only to *general* restraints on alienation—transfers of property on condition that it not be resold at all. The very next section of the commentary states:

> "If a feoffment in fee be made upon condition that the feoffee shall not infeoffe J.S. or any of his

[illegible]

> heirs or issues, etc., this is good, for he doth not restrain the feoffee of all his power. . . ." Coke, *Commentary upon Littleton* § 361 (19th ed. 1832).

To the same effect, *compare* Gray, *Restraints on Alienation* §§ 27-28 (2d ed. 1895) (cited in *Dr. Miles*, 220 U.S. at 405), *with id.* §§ 31-44.[6] And of course, all of this ancient lore is directed solely towards conveyances in fee simple. It has nothing to do with the restraints—far more extensive—that could be attached to conveyances of lesser estates. It should be apparent by now that these *arcana*, even were they in point, have little to do with the antitrust laws. As Professor Chafee remarked,

> "It does seem possible that the nineteenth and twentieth centuries have contributed legal conceptions growing out of new types of business which make it inappropriate . . . to base [a] . . . sweeping overthrow of contemporary commercial policies on judicial views of the reign of Queen Elizabeth." Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 983 (1928).

In fact, most Sherman Act cases, see pp. 11-13, *infra*, have upheld restraints on alienation as reasonable.

The other authorities that the Motion to Affirm cites as in accord with Coke § 360 are also beside the point here. *Boston Store v. American Graphophone Co.*, 246 U.S. 8 (1918), and *Straus v. Victor Talking Mach. Co.*, 243 U.S. 490 (1917), are both price-fixing cases. And *Adams v. Burke*, 17 Wall. 453 (1873), is concerned solely with the scope of the patent monoply. The case has nothing to do with legality under the general law, apart from the patent statute.

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[6] See also Bracton, *De Legibus et Consuetudinibus Angliae*, lib. 1, fol. 13 (Woodbine ed. 1922).

C. The Horizontal-Market-Division Cases

Finally, the Government argues by analogy from the line of cases holding that horizontal territorial division among competitors is unlawful *per se*. Vertically imposed division has the same effect as horizontally agreed-upon division; therefore it should likewise be illegal *per se*—so the argument runs. But this argument from similarity of effect proves too much. Appellant could achieve the same effect by acquiring all its distributors and dealers by merger, an arrangement that would not be *per se* unlawful, but that would not have the advantage of fostering independent small businessmen. Beyond that, the purpose of vertical territorial limitations is completely different from that of horizontal division. The primary intent and effect of vertical territorial limitations are to enhance interbrand competition, whereas the principal intent and effect of horizontal division would be to suppress intrabrand competition. Moreover, a horizontal agreement among competitors is simply a naked restraint of trade. Its only reason for being is the restriction of competition. A vertical territorial restriction, on the other hand, is (or may be, in an appropriate case) merely ancillary to and in aid of the main lawful purpose of a contract between buyer and seller, *i.e.*, the distribution of goods in commerce. Just as restraints in connection with sales of business, or contracts of employment, are valid if reasonable, so restraints in aid of lawful contracts of sale of personal property are valid if reasonable. See, *e.g.*, *Cincinnati, P., B. S. & P. Packet Co. v. Bay*, 200 U.S. 179 (1906); *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64 (1873).

This is by no means a novel analysis. The doctrine is clearly laid out in Judge Taft's seminal opinion in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211

(1899), wherein restraints of trade are said to be lawful if

> ". . . ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."[7]

In the instant case, there are contracts of sale, all with a main lawful purpose, together with an admitted restraint of trade ancillary thereto. The inquiry must be (1) what is the extent of the seller's legitimate interest; (2) whether the restraint goes beyond the necessary protection thereof; (3) what is the effect of the restraint on the public's interest in free trade. None of these questions can be answered without a trial.[8]

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[7]The panel of judges that sat in that case gives this language extraordinary authority. Not only did Judge Taft later become Chief Justice; his opinion was joined by Justice Harlan, sitting as Circuit Justice, and by Judge, later Justice, Lurton.

[8]Two authorities cited in the Motion to Affirm (pp. 8-9) may be dealt with here. It is true that the alternative holding in Baldwin-Lima-Hamilton Corp. v. Tatnall Measuring Sys. Co., 169 F. Supp. 1, 28-31 (E.D. Pa. 1958), *aff'd on other grounds per curiam*, 268 F.2d 395 (3d Cir.), *cert. denied*, 361 U.S. 894 (1959), was to the effect that it is *per se* illegal to limit the purposes for which a patented article may be resold. But, for one thing, this holding is by no means clearly correct, see General Talking Pictures Corp. v. Western Elec. Co., 305 U.S. 124, *affirming on rehearing* 304 U.S. 175 (1938); Note, *Patent Use Restrictions*, 75 Harv. L. Rev. 602 (1962). And, for another, the Third Circuit's affirmance was based on an entirely different ground: a ground which, indeed, was regarded as "more basic," 169 F. Supp. at 30, by the District Court. And finally, the case involved only the use of a patented article, not the area within which it could be sold. The other case relied on by the Government, United States v. American Linen Supply Co., 141 F. Supp. 105, 112-15 (N.D. Ill. 1956), is actually authority for the appellant. For there the court, in denying a motion to dismiss under Fed. R. Civ. P. 12(b)(6), stated that "this controversy can be resolved only through a trial." *Id.* at 114. That is exactly appellant's position here. Appellant has never contended that it is entitled to judgment without trial—only that the Government is not.

D. The Cases in Point Reject a *Per Se* Rule

A substantial body of authority supports the application of the foregoing analysis to territorial and customer restraints and refuses to invalidate them *per se*.

The first case, in point of time, was *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593 (8th Cir. 1903), *cert. denied*, 192 U.S. 606 (1904). The defendant there, a cement jobber, agreed to buy cement from the plaintiff and promised not to resell it outside the state of Texas. The defendant then refused to accept the cement on the ground that the contract violated the Sherman Act, and the plaintiff sued him for damages.[9] The Circuit Court of Appeals for the Eighth Circuit held squarely that the contract was legal and enforceable. This was the sole basis of the decision. The fact (if it is a fact) that under *Kelly v. Kosuga*, 358 U.S. 516 (1959), the decision could have gone on another ground, is immaterial.[10] The Court, applying the *Addyston Pipe* formula, held that

> ". . . this restriction was not the chief purpose or the main effect of the contract of sale, but was a mere indirect and immaterial incident of it." 125 Fed. at 595.

This rationale was applied to the distribution of automobiles in *Reliable Volkswagen Sales & Serv. Co. v. World Wide Automobile Corp.*, 182 F. Supp. 412, 424-27 (D.N.J. 1960), in which Judge Forman granted a motion to dis-

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[9]Contrary to the statement in the Motion to Affirm, p. 9 and n. 4, the action was *not* for the purchase price of goods already sold and delivered.

[10]It is noteworthy, moreover, that the *Kosuga* case itself, in the trial court, upholds a general restraint on alienation. Kosuga v. Kelly, 1957 Trade Cas. ¶ 68,714 (N.D. Ill. 1957), *aff'd on other grounds*, 257 F. 2d 48 (7th Cir. 1958), *aff'd*, 358 U.S. 516 (1959). The Supreme Court did not disapprove this holding.

miss a complaint attacking the imposition of territorial restrictions on distributors, where there was no allegation of public injury, on the ground that such a restraint was not *per se* illegal. Whatever the present status of the public-injury doctrine, the case squarely holds that an automobile distribution system similar in all respects to the one used by White Motor Co. is not illegal *per se*. The case does *not* concern, as the Motion to Affirm, pp. 9-10 and n. 5, erroneously states, the mere limitation of the number of dealers in a particular area. *Cf., e.g., Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418 (D. C. Cir.), *cert. denied*, 355 U.S. 822 (1957). Volkswagen distributors were allegedly permitted to sell only to dealers located within their respective exclusive territories, and this restriction was upheld.

Another very recent case sustains customer restrictions: In *Revlon, Inc.* v. *Regal Pharmacy*, 132 U.S.P.Q. 187 (E.D. Mich. 1961) (alternative holding), a distribution system forbidding jobbers from reselling except to beauty shops and schools, and forbidding the latter to resell to the public, was upheld. See also *Beloit Culligan Soft Water Serv., Inc.* v. *Culligan, Inc.*, 274 F.2d 29 (7th Cir. 1960). Other cases substantially in accord with appellant's position, cited in the Jurisdictional Statement and not distinguished by the Motion to Affirm, include *United States* v. *Newbury Mfg. Co.*, 36 F. Supp. 602 (D. Mass.), *motion to vacate denied*, 123 F.2d 453 (1st Cir. 1941); and *P. Lorillard Co.* v. *Weingarden*, 280 Fed. 238 (W.D.N.Y. 1922). Furthermore, *Boro Hall Corp.* v. *General Motors Corp.*, 124 F.2d 822, *rehearing denied*, 130 F.2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943), did not involve only a contract not to set up a place of business outside a certain area. It also upheld a requirement that Chevrolet dealers not solicit customers outside their territories, as the opinion of the District

Court makes clear. See *Boro Hall Corp. v. General Motors Corp.*, 37 F. Supp. 999, 1000 (S.D.N.Y. 1941).[11]

The Federal Trade Commission has consistently refused to hold exclusive territorial arrangements unlawful *per se*. One of the earliest rulings of that body expressly upheld such an arrangement. *Conf. Rul. No. 15*, 1 F.T.C. 543 (1915). This rule was adhered to in *General Cigar Co.*, 16 F.T.C. 537 (1932), and, more recently, in *Roux Distrib. Co.*, 55 F.T.C. 1386 (1959) (alternative holding), in which *Bausch & Lomb* was characterized simply as a price-fixing case, *id.* at 1388, customer limitations were held not invalid *per se*. The most recent pronouncement of the Commission on the subject is cited by the Government in this case, but in fact scrupulously refrains from holding territorial restrictions unlawful *per se*. *Snap-On Tools Corp.*, FTC Dkt. 7116, 3 CCH Trade Reg. Rep. ¶ 15,546 (Nov. 1, 1961).

This preliminary and cursory view of the authorities amply demonstrates that the decision below is not so clearly right as to deserve summary affirmance.

IV. Important Business Factors Which a Per Se Rule Ignores

The rigid *per se* rule sweeps aside as irrelevant a vast body of business experience. Exclusive territorial distributorships are devices of long standing, found useful and appropriate by the White Motor Company for approximately half a century. The practice became increasingly common in the first three decades of this century, simply because it greatly facilitates the distribution of certain types of goods. *E.g.*, Hotchkiss, *Milestones of Marketing* 245-47 (1938).

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[11]Further confirmation that this anti-solicitation provision was also part of the contract assailed may be found in the later litigation instituted by the dealer, this time based on state-law grounds. See Boro Hall Corp. v. General Motors Corp., 68 F. Supp. 589 (1946), *motion to vacate denied* 6 F.R.D. 539 (E.D.N.Y. 1947).

Thorough analysis of business and economic factors has demonstrated that the device is peculiarly beneficial in the marketing of very expensive, heavy merchandise, requiring constant service, through distributors and dealers who must make an immense capital investment out of their own funds. N.Y.U. Bureau of Business Research, *The Exclusive Agency* 2, 58-62 (1923) (sample contract in motor-truck industry set forth); *The Use of Exclusive Retail Agencies*, 3 Harv. Bus. Rev. 485, 492 (1925). Automobile and truck dealers have become a new class of independent small businessmen, see Moore, *The Automobile Industry*, in *The Structure of American Industry*, at 274, 316 (Adams rev. ed. 1954); and the territorial-distributorship practice has encouraged this development. The practice has been particularly common in automotive distribution, *e.g.*, Kennedy, *The Automobile Industry* 63 (1941); Sinsabaugh, *Who, Me? Forty Years of Automobile History* 233 (1940). It has been viewed as perfectly legal by business authorities. Converse, Huegy & Mitchell, *Elements of Marketing* 705-07 (5th ed. 1952); N.Y.U. Bureau of Business Research, *op. cit. supra*, at 16.

Beyond these general considerations, special circumstances peculiar to the trucking industry, and to the White Motor Company in particular (circumstances which were brought to the District Court's attention, J.S. pp. 48-49), combine to make the practice as used by White reasonable under the Sherman Act. White wants and needs this kind of contract. On the strength of it, it has built up tremendous good will in its dealers and distributors. They have invested great sums in land, buildings, inventory, advertising, and servicing know-how. Since the volume of White's business is not nearly so great as that of its giant competitors, Ford, General Motors, and International Harvester, White needs assurance that its dealers will get the cream

of the market in their respective territories, in order for them to be able also to go after hard-to-get sales. Not only would many independent small businessmen be irreparably injured by a *per se* rule; it would no longer be possible to obtain dealers of the ability and financial responsibility required in order to market trucks properly, and the business of White itself, the oldest surviving independent truck manufacturer, would also be irreparably injured.

The restraints involved in this case, moreover, go no further than necessary to assure the adequate performance by White's dealers of their servicing and selling obligations. For example, competition is not eliminated as to customers that have places of business in more than one territory—any distributor or dealer located in the same territory with any of such places of business may freely sell to such a customer. See, *e.g.*, Distributor Selling Agreement, art. 2 (Exhibit 1 to Deposition of Alfred W. Edgerton, on file with this Court).

The crux of the matter is that: without its system of territorial and customer limitations, White would be far less able to rival its giant competitors. Service is White's main selling point. It may be that some small amount of inter-dealer competition is eliminated—though nothing of the kind has been proved. But what is that to the great stimulation of interbrand competition? Clearly, the public interest in maintaining White as a vigorous competitor against the giants is far greater than that in forcing White to allow its dealers to fight among themselves. Yet the District Court ignored all these factors. The salutary purpose of the Sherman Act is to foster competition. The opinion below, though written in the name of competition, perverts that purpose.

No. 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

THE WHITE MOTOR COMPANY, *Appellant*,

v.

UNITED STATES, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

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V. There Should Be a Full Hearing in This Court

The decision below went on summary judgment. There was no trial to evaluate and sift all the business factors relevant to a proper analysis of this complicated question of antitrust law. Experience, no less than reason, teaches that such difficult matters should not be precipitately decided. Even if the practices involved, or some of them, should *eventually* be held *per se* illegal, such a departure from prior law should not be made in a factual vacuum, without a trial. Summary-judgment procedure is to be used with particular care in complex antitrust litigation, *cf. Poller* v. *Columbia Broadcasting Sys., Inc.*, 368 U. S. 464, 473 (1962). This Court should correct the situation when that procedure has been misused below. Compare *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

More basically, such an important and far-reaching question should be decided only by this Court after full hearing. This is the White Motor Company's only opportunity for review. It would be "unthinkable," as this Court recently observed, *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 (1961), quoting with approval *Hartford-Empire Co.* v. *United States*, 324 U.S. 570, 571, *clarifying* 323 U.S. 386 (1945), for such an important and far-reaching question to be decided, with nationwide effect, by a single district judge.

CONCLUSION

For the foregoing reasons, appellant respectfully prays that the Government's motion for summary affirmance be denied, that this Court enter an order noting probable jurisdiction of this appeal, and that the case be briefed and argued orally on the merits.

Respectfully submitted,

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